

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 89-64-E - ORDER NO. 90-47  
MARCH 12, 1990

Berkeley Electric Cooperative, Inc.,	)	
	)	
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
South Carolina Electric & Gas Company,	)	
	)	
Respondent	)	
	)	

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INTRODUCTION

On January 27, 1989, Berkeley Electric Cooperative, Inc. ("Berkeley" or "the Cooperative") filed a Petition and Rule to Show Cause seeking temporary and permanent injunctive relief requesting that the Public Service Commission of South Carolina direct South Carolina Electric & Gas Company ("SCE&G") to immediately cease and desist from any efforts to obtain rights of way for the construction of electric facilities and from the provision of electric service in the areas located within territory assigned by the Commission to Berkeley and annexed by the City of Charleston ("the City") on Johns Island. The Commission on February 15, 1989, heard oral arguments on the request for a cease and desist order.

The Commission denied the request for a cease and desist order and determined that a hearing should be held on the merits of the case. A hearing was begun on June 5, 1989 and continued intermittently through July 18, 1989. A night hearing was held for members of the public of Johns Island on June 8, 1989. Oral arguments on the law of the case were heard by the Commission on October 19, 1989. Numerous witnesses were presented and cross-examined during the hearing and 67 exhibits were admitted into evidence. The transcript of the hearing consisted of twelve volumes. Intervening in this matter were the Electric Cooperatives of South Carolina, Central Electric Power Cooperative, South Carolina Public Service Authority and the Johns Island Citizens for Cooperative Power.

There were four outstanding motions that the Commission indicated during the hearing that it would rule on in its final order. The first two motions involved testimony by Mr. Hanckel and Mr. Hart testifying on behalf of Johns Island Citizens for Cooperative Power concerning a purported zoning ordinance violation. The zoning ordinance was not put into the record, therefore, the Commission finds that the testimony of Mr. Hanckel and Mr. Hart concerning that ordinance should be stricken from the record. Another objection was made concerning the testimony of Grover Croft. Counsel for the Plaintiff alleged that Mr. Croft's testimony was hearsay due to the fact that his testimony concerned the expectations and attitudes of the cooperatives concerning territorial assignment. The Commission finds that Mr. Croft's testimony should be stricken. Mr. Croft could not have

independent knowledge of the thoughts of the cooperatives. The Plaintiff also moved that the testimony of Patricia T. Smith, an attorney for SCE&G, be stricken on the grounds that parts of her testimony contained conclusions of law concerning territorial assignment legislation. The Commission must make the conclusions of law; however, it allowed Ms. Smith's testimony to remain in the record and gave it the weight it thought was appropriate.

There was also discussion during the hearing about a Ferillo-Gregg memorandum that was declared confidential by Berkeley and put into the hearing record under seal. Subsequent to putting that memo under seal, the Commission ruled that certain documents submitted by SCE&G concerning developer incentive plans and other issues were not confidential over SCE&G's objections. SCE&G requested then that the Ferillo-Gregg memorandum also be declared not confidential and unsealed. The Commission finds that the Ferillo-Gregg memorandum does not contain confidential material and therefore should be unsealed.

The Commission after reviewing the evidence in the record, makes the following findings of fact and conclusions of law:

1. Berkeley Electric Cooperative is an electric distribution cooperative which has provided electric service for approximately fifty (50) years to residential and commercial consumers on Johns Island, Charleston County, South Carolina.

2. SCE&G is an electric supplier licensed to do business in the State of South Carolina. SCE&G has been providing utility service in the City of Charleston through predecessor companies

since 1846 and is currently operating in the City of Charleston pursuant to a franchise agreement.

3. Power is supplied to Berkeley Electric Cooperative for service on Johns Island through Central Electric Power Cooperative. Central Electric Power Cooperative is responsible for the planning, designing, financing and construction of any facilities above the distribution substation level necessary to meet the power requirements of its member cooperatives. Central serves fifteen (15) distribution cooperatives with Berkeley being one of those 15. Most of Central Electric Power Cooperative's power is purchased from the South Carolina Public Service Authority commonly called Santee Cooper.

4. On August 28, 1973, the Public Service Commission, pursuant to State law, assigned territory to Berkeley consisting of approximately 90% of the land area of Johns Island. Berkeley has been required by S. C. Code Ann., §58-27-1210 (1976), to provide electric service to all electrical consumers in the assigned area. Berkeley presently is providing electric service to approximately 3900 residential and commercial accounts in the Johns Island area.

5. Subsequent to this assignment of the Johns Island area to Berkeley by the Commission, the City of Charleston annexed portions of Johns Island, including a portion of the Johns Island territory assigned to Berkeley by the Commission.

6. Both Berkeley and SCE&G have been granted a franchise by the City of Charleston to use the streets and public places within the City.

7. SCE&G acquired easements, cleared right of way, solicited service accounts, and constructed electrical facilities in and across Berkeley's assigned territory for the purpose of providing electrical service to the Piggly Wiggly Shopping Center located within the assigned area of Berkeley that was annexed by the City in Johns Island.

8. The Territorial Assignment Act which was enacted by the South Carolina Legislature in 1969 established exclusive electric service territories throughout the State of South Carolina. Areas within municipalities were not covered by the Act.

9. The South Carolina Legislature in 1984 passed Act 431. This act provides that the policy of South Carolina is ". . . to maintain the assignment of electric service territories by the Public Service Commission over areas having been assigned to electric suppliers under Section 58-27-640, even when the area becomes incorporated or annexed to an existing city or town."

10. The Territorial Assignment Act as codified at Section 58-27-640 directed the Commission to assign "all areas that are outside the corporate limits of municipalities".

11. Act 431, as codified in Section 58-27-670, states "The furnishing of electric service in any area which becomes a part of any municipality after the effective date of this section, either by annexation or incorporation, whether or not the area, or any portion of the area has been assigned pursuant to Section 58-27-640, is subject to the provisions of Sections 58-27-1360 and 33-49-250 and any provisions of this article."

12. Act 431 was enacted after the 1969 Territorial Assignment Act, therefore, if there is any conflict between the two, Act 431 would prevail. ". . . when there is a conflict between statutory provisions the later enacted legislation prevails." The City of Newberry vs. Public Service Commission of South Carolina and Newberry Electric Cooperative, Inc., 287 S.C. 401, 339 SE 2nd 124 (1986).

13. Based upon the same principle of construction, Act 431 also impliedly modified Section 58-27-1230, which was passed as part of the Electric Utilities Act of 1932 and which permitted electric utilities to begin construction or operation of any electrical utility plant or system or of any extension thereof within municipal limits under certain conditions without first obtaining a Commission certificate of convenience and necessity.

14. The legislature's policy of eliminating unnecessary duplication through the maintenance of Commission assigned territories within annexed areas could not be accomplished if an electrical utility could, pursuant to Section 58-27-1230, continue to construct, extend, and operate its system within the newly annexed areas.

15. Section 58-27-670, as amended, contains the following language:

"Annexation may not be construed to increase, decrease or affect any other right or responsibility a municipality, rural electric cooperative or electrical utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58."

16. The legislature preserved in annexed areas the electric service rights electric suppliers already had in those areas when assigned by the Commission.

17. The S. C. Supreme Court in the City of Abbeville vs. Aiken Electric Cooperative, Inc., 287 S.C. 361, 338 S.E.2d 831 (1985) upheld Act 431's constitutionality, but in Blue Ridge Electric Cooperative vs. City of Seneca, \_SC\_, 376 S.E. 2d 514 (1989) the Court limited the Act's applicability with respect to a municipal electric utility's right to serve in assigned territory inside its municipal limits.

18. The Court declared in Seneca that a municipality may provide electric service to new customers and premises in an assigned annexed area. The purpose of the limitation in the Seneca case was to acknowledge the municipality's right to consent to the use of its streets under Article 8, Section 15 of the S. C. Constitution as upheld in Abbeville.

19. In this case there is no constitutional issue concerning municipal consent because both Berkeley and SCE&G have the City's consent to use its streets.

20. To the extent that it is consistent with the South Carolina Constitution, it is the duty of the Commission to carry out the statutory enactments that enforce the policy of Act 431, which is to preserve the integrity of territorial assignment.

21. Pursuant to Act 431, Berkeley's right to serve in its assigned territory on Johns Island that has been annexed by the

City is exclusive vis-a-vis SCE&G.

#### DISCUSSION

Although the Commission was presented much testimony from the parties in this case, the Commission's opinion is that the issues presented to it are primarily issues of law set forth as follows:

(1) Whether maintaining the integrity of territorial assignment would violate any constitutional rights of the City of Charleston and, if not,

(2) Does Section 3 of Act 431 require the Commission to uphold Berkeley's exclusive right to serve the area on Johns Island previously assigned to Berkeley and annexed by the City of Charleston.

The Commission is of the opinion and so finds that since the City of Charleston has granted both Berkeley and SCE&G the right to use its streets, alleys, or other public ways within the corporate limits of the City of Charleston by virtue of granting both Berkeley and SCE&G nonexclusive franchises, and further, since the City of Charleston has not designated which, if either supplier, should have the exclusive right to serve within its municipal limits on Johns Island, no constitutional right of the City would be infringed by upholding Berkeley's exclusive right to serve the assigned territory.

Based upon the Commission's findings as set forth above, the Commission has determined that pursuant to Act 431, particularly Section 58-27-670 (1976), as amended, Berkeley has the exclusive



right to serve the territory previously assigned to it on Johns Island and annexed by the City of Charleston.

The Commission does not find it necessary and therefore does not address the issue of what Berkeley's service rights would be without its franchise from the City of Charleston. Nor, does the Commission find it necessary to determine whether the City of Seneca case, which limited Act 431's applicability with respect to a municipal electric utility's right to serve in assigned territory inside municipal limits, applies to other electric utilities. In the Seneca case, the City of Seneca designated the particular utility which it desired to serve the customer. In this case, the City of Charleston has not done so, and therefore, the limitation as expressed in the City of Seneca case is not before the Commission.

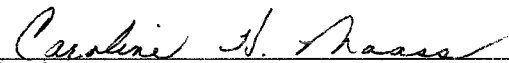
Although the Commission is extremely concerned about the allegations made by witnesses supporting Berkeley regarding wasteful, unnecessary duplication in Berkeley's service area by SCE&G and unreasonable interference by SCE&G with Berkeley's electric system on Johns Island, due to the Commission's legal conclusion that in this particular case Act 431 mandates the maintaining of Berkeley's exclusive service rights in the subject area, the Commission need not address these allegations in this matter. It is also not necessary for the same reason to address Berkeley's allegation that SCE&G's construction of electric facilities in Berkeley's assigned area on Johns Island was an unconstitutional taking of Berkeley's property.

Based on the Commission's ruling that Berkeley's service rights are exclusive vis-a-vis SCE&G in its assigned area on Johns Island that has been annexed by the City, the Commission orders SCE&G to dismantle its electric lines and electric facilities in the assigned annexed area. SCE&G may not provide electric service in Berkeley's assigned territory on Johns Island that has been annexed by the City.

IT IS THEREFORE ORDERED:

1. That Berkeley's electric service rights in its assigned area on Johns Island that has been annexed by the City are exclusive vis-a-vis SCE&G.
2. That SCE&G dismantle its electric lines and electric facilities in Berkeley's assigned area on Johns Island.
3. That the parties should cooperate with respect to minimizing or eliminating any inconvenience to any customer affected by this Order and that the parties work together to insure a smooth transfer of services.
4. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Executive Director  
(SEAL)